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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 415

F. ENGLISH, Individually and as General Secretary Treasurer of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, DAVE BECK, DANIEL J. MURPHY, JOHN F. CONLIN, SIDNEY L. BRENNAN, JOHN T. O'BRIEN, FRANK BREWSTER, WILLIAM A. LEE, JOSEPH DIVINE, JAMES R. HOFFA, EINAR MOHN, HARRY TEVIS, HAROLD J. GIBBONS, GORDON R. CONKLIN, GEORGE R. MOCK, JOHN J. O'ROURKE, THOMAS E. FLYNN, OWEN BRENNAN, JOHN J. BACKUS, MURRAY W. MILLER and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*

v.

JOHN CUNNINGHAM, THOMAS G. MANNING, FRANK KENNEDY, ANDREW BOGGIA, GEORGE BECKER, JOSEPH MOLLOY, JOHN MCMANUS, HAROLD WILL, STEVE MILONE, JOHN MCGLYNN, EDWARD MCFARLAND, JOHN OLSEN and HOWARD GALL, *Respondents*

PETITION FOR A WRIT OF CERTIORARI

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No.

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v.

JOHN CUNNINGHAM, THOMAS G. MANNING, FRANK KENNEDY, ANDREW BOGHN, GEORGE BUCKER, JOSEPH MORLOY, JOHN MCMANUS, HAROLD WILZ, STEVE MILONE, JOHN MCGLYNN, EDWARD MCFARLAND, JOHN OLSEN and HOBART GALT, *Respondents*

PETITION FOR A WRIT OF CERTIORARI

The above named petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on July 9, 1959.

THE OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia, dated December 11, 1958, is unreported and is printed in the appendix hereto, p. 1a. The opinion and supplemental opinion of the Court of Appeals, not yet reported, are printed in the appendix, pp. 11a and 50a.

JURISDICTION

The judgment of the Court of Appeals, entered on July 9, 1959, is printed in the appendix, p. 53a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

When an international union, comprising about 900 local unions and other subordinate bodies and about 1,600,000 members, has held a convention at which a new constitution was adopted and new officers were elected; and several members of five of the local unions, claiming that the convention was rigged, bring suit in a federal district court on behalf of themselves and all other members against the international and its officers, seeking an injunction against the effectuation of the constitution and the seating of the officers and an order for a new convention and election to be conducted under judicial supervision; and a compromise is reached by the parties whereby the constitution is provisionally effectuated, the officers are provisionally installed, a Board of Monitors is appointed, the defendants obligate themselves to study specified union problems with the counsel and recommendations of the Board of Monitors and to take specified action where needed, and a new convention is to be called at such time, after one year from the date of the compromise, as is deter-

mined by majority vote of the International's General Executive Board, the monitorship to terminate with the holding of the new convention:

1. Is it within the judicial power of the court, under Article III of the Constitution of the United States, by consent or otherwise, to conduct a broad and continuing investigation of the International and its constituent bodies, for the purpose of bringing to light matters deemed to require regulation or reformation and thereafter conducting hearings to culminate in orders of regulation or reformation; and, if such judicial power exists, may it be applied to a suit in which the case or controversy presented relates only to the validity of the challenged convention under the International's constitution and the right of the membership to have a new convention held?

2. If such authority is within the judicial power, does the principle of judicial self-restraint dictate that it not be exercised?

3. May the consent decree which was entered by the district court to embody the parties' compromise be properly construed to confer upon that court the broad power described in the first question, thereby raising the constitutional issue referred to therein?

4. May the court, without the consent of the defendants, modify the consent decree (a) to make the date of the new convention determinable by the court rather than by the International's General Executive Board; (b) to postpone the effectuation of the constitution until the giving of a notice nowhere provided for in the constitution; and (c) to require the conduct of intra-union disciplinary proceedings under procedures at variance with those specified in the constitution?

STATEMENT

The suit underlying this petition was brought in the United States District Court for the District of Columbia, in September 1957, by the respondents, thirteen members[1] of five New York locals of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "I.B.T."), against the I.B.T. and its officers. Suing on behalf of themselves and all other members of the I.B.T., the respondents alleged that the defendants had violated the I.B.T. constitution and had rigged the convention to be held in October 1957. They sought an injunction against the holding of the convention and the appointment of masters or receivers to supervise a new convention and the selection of delegates thereto. R. 1, 26.

Respondents failed to stop the 1957 convention *pendente lite*.[2] The convention was held and new officers were elected and a new constitution adopted. Respondents thereupon amended their complaint to seek an injunction against effectuating the acts of the convention and named the newly elected officers as defendants. R. 35. The defendants named in the amended complaint are the present petitioners. On October 16, 1957, petitioners answered the amended complaint, denying substantially all but its formal allegations. R. 38. By a preliminary injunction on Oc-

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[1] One of the plaintiffs, John Cunningham, has since dissociated himself from the group.

[2] The District Court, by a preliminary injunction on September 23, 1957, in effect prohibited the holding of the convention (R. 31), but the Court of Appeals granted a stay of that injunction (R. 34) and the Chief Justice of the United States, sitting as Circuit Justice, denied a petition to vacate the stay. R. 33.

tober 23, 1957, the District Court prohibited the seating of the new officers and the effectuation of the new constitution.[3] R. 51.

The case thereafter went to trial, the parties meanwhile carrying on intensive negotiations in search of a practical compromise. Before the time came for petitioners to put in their defense, a compromise was reached whereby the preliminary injunction was to be dissolved, the acts of the 1957 convention were to be effectuated, and a new convention was to be held after a year, rather than in 1962 as would be the case under the I.B.T. constitution, the exact time to be determined by the new General Executive Board of the I.B.T. It was agreed also that the new officers would meanwhile review specified union problems with the counsel and recommendations of a Board of Monitors—e.g., accounting and financial procedures and local unions in trusteeship. The new officers undertook to establish such financial procedures where needed and to restore trusteed locals to autonomy as speedily as might be consistent with the interest of the membership. To permit the new officers to be installed, so that they could accept the compromise on behalf of the I.B.T., the District Court dissolved its preliminary injunction on January 23, 1958. R. 56. The compromise was then embodied in a consent decree which the District Court adopted on January 31, 1958. R. 58; appendix, p. 38a.

The decree named as members of the Board of Monitors Mr. Godfrey P. Schmidt, nominated by respondents, Mr. L.N.D. Wells, Jr., nominated by petitioners,

[3] The Court of Appeals, on November 4, 1957, modified that preliminary injunction in respects not here pertinent. R. 54.

and Judge Nathan Cayton as chairman, jointly nominated by respondents and petitioners. "For several months the parties operated under the consent decree with apparently perfect harmony and very satisfactory progress was made." R. 788-96, 833.

In May 1958, Judge Cayton resigned as chairman of the Board of Monitors and was succeeded by Mr. Martin F. O'Donoghue. Soon thereafter difficulties arose. The Board of Monitors, under the majority control of Messrs. O'Donoghue and Schmidt, departed from its previous practice of counselling with petitioners and began to issue orders. Moreover, the Board of Monitors began to expand the scope of its activities beyond the literal limits of the consent decree, undertaking what it chose to call a "general housecleaning" of the I.B.T. To obtain judicial sanction of their expanded activities, the majority of the Board of Monitors filed in the District Court a petition "for Construction, Reformation and or Modification of the Consent Order and for Instructions and Orders of Compliance." R. 64. A similar petition was thereafter filed on behalf of the respondents. R. 99.

On December 11, 1958, the District Court rendered its Memorandum Opinion (R. 164; appendix, p. 1a) holding that the Monitors possessed mandatory rather than recommendatory powers and that their authority extended to "general housecleaning" of the I.B.T. On February 9, 1959, the District Court entered its

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[1] E.G., most of the "trusteed" locals had already been or were in the process of being restored to autonomy when the program of restoration was suspended at the request of the Board of Monitors. R. 793-94. Another significant reform was the elimination of the so-called "paper locals." R. 794.

order (R. 281; appendix, p. 44a) requiring, *inter alia*, that petitioners comply promptly and fully with specified "Orders of Recommendation" theretofore issued by the Board of Monitors and with all future "Orders of Recommendation that are reasonable and relevant to the basic purposes of the Consent Decree" and modifying the consent decree to prevent the calling of a new convention until such time as might be recommended by the Monitors and approved by the court.

Petitioners appealed from this order to the Court of Appeals and sought a stay of its execution, which was granted on March 31, 1959. On June 10, 1959, the Court of Appeals issued its opinion (R. 680; appendix, p. 11a) reversing in part and affirming in part the District Court's order and, on July 9, 1959, entered a supplemental opinion and the judgment which petitioners now seek to have reviewed. R. 760, 764; appendix, pp. 50a, 53a.

The Court of Appeals rejected the District Court's holding that the Board of Monitors possessed mandatory powers. It held, however, that petitioners have a wide variety of "definite obligations" under the consent decree, that the Monitors may make recommendations to petitioners in the areas of those obligations, and that the District Court, after giving petitioners an opportunity to be heard, may order petitioners to perform their obligations by carrying out the Monitors' recommendations. Accordingly, the Court of Appeals, though reversing the requirement of obedience to future "reasonable and relevant" recommendations, upheld, in substantial part, so much of the District Court's order as required compliance with the orders of recommendation already made. As

to the date of a new convention, the Court of Appeals reversed so much of the District Court's order as made the date dependent upon the Monitor's recommendation and ordered instead that the date be determined by the District Court.

Petitioners sought a stay of the judgment of the Court of Apeals, which that court denied on July 15, 1959. R. 782. On July 20, 1959, petitioners applied for a stay to Mr. Justice Frankfurter, sitting as Circuit Justice. That application was denied in a written opinion on August 4, 1959.

Mr. Justice Frankfurter noted "the candid acknowledgment of the Chairman of the Board of Monitors and counsel for plaintiffs that serious legal questions are at stake" and the recognition "by all concerned" that the judicial supervision of the I.B.T. here involved "is an unusual manifestation of equity powers." He denied the stay, however, solely because he concluded that no irreparable injury could occur "before this Court could pass on a petition for certiorari," stating that, if he concluded otherwise, he "would feel constrained to grant the stay." See slip opinion of Mr. Justice Frankfurter, pp. 2, 3, 4.

REASONS FOR CERTIORARI

Introductory

This case is of far-reaching significance, not alone because of the serious impact it has upon the interests of the 1,600,000 members of the largest trade union in the western hemisphere, but also because of the "serious legal questions" which Mr. Justice Frankfurter noted it poses. Those questions, as will be more fully set

forth hereinafter, affect the extent of the judicial power under Article III of the Constitution of the United States; the propriety of the exercise of judicial power; the permissible scope of judicial interference in the internal affairs of labor unions; and the unilateral modifiability of consent decrees, a matter having great bearing upon the utility of such decrees as an instrument of law enforcement in the antitrust field.

I. As Construed by the Court Below, the Consent Decree Was Beyond the Judicial Power of the District Court Under Article III of the Constitution of the United States.

The court below has construed the consent decree, entered in compromise of respondents' suit for a new convention, as imposing upon petitioners a great range of obligations. The obligations thus held to have been imposed, contrary to the plain meaning of the decree as petitioners submit it must be read (see Point III, *infra*), relate to such matters of internal union management as the effectuation and dissolution of mergers of local unions, the prosecution of intra-union disciplinary proceedings against local and international officers for alleged wrongdoing long antedating the decree, the imposition of new trusteeships on locals now autonomous, the control of welfare funds under joint union-employer management, and such unconstitutional interference with local union independence

[1] Petitioners, although mindful of the desirability that a petition for certiorari be as brief as possible and be a statement of reasons for granting the petition, rather than an argument in support of the legal contentions, respectfully submit that the novelty and complexity of the issues here presented require a more detailed statement than would ordinarily be justified. They therefore request the indulgence of the Court for the length of this petition and the amount of argument it contains.

as the postponement of their elections and the imposition upon them of extra-constitutional election qualifications and election controls.

Having imposed these obligations upon petitioners, the court below then construed the consent decree as conferring upon the District Court authority to conduct, through the Board of Monitors as officers of the court, a far-ranging and continuing investigation of the I.B.T. and its almost 900 constituent locals and other subordinate bodies, located in judicial districts all over the United States and some even in Canada, reaching into any area of union affairs bearing any relation to the aforesaid obligations. The purpose of this investigation is to bring to light, very much as the Senate Select Committee on Improper Activities in the Labor or Management Field (the "McClellan Committee") undertook to do, allegedly illegal or otherwise undesirable practices and conditions within the vast union organization. Thereafter, with respect to any of such practices or conditions as to which the court below has held petitioners to have obligations to take corrective action, the District Court may hold hearings and, upon determining the existence of the practice or condition in question and the applicability to it of any of those obligations, order petitioners to take such action as the court may deem necessary.

The court below has thus held that the District Court has the power to conduct a broadly ramified investigation of one of the largest voluntary associations in the world *for the purpose of discovering what, if any, justiciable controversies may be extracted for decision*. Neither the court nor the parties can predict, in advance of the investigation, the nature of the controversies to be submitted for adjudication. The function

assigned to the District Court is one that looks not toward adjudication of a definite case or controversy, but rather toward some as yet undetermined system of regulation of the complex affairs of the I.B.T. It is a legislative rather than judicial function. Indeed, it is precisely the legislative function which the McClellan Committee has purported to perform over the past two years. If the underlying matrix of facts in this case is, as some witnesses before the Committee, untested by cross-examination, have portrayed it, that there have been improprieties or illegalities in the administration of the affairs of locals or other subordinate bodies of the I.B.T. in Pennsylvania, Missouri, Michigan, Tennessee and Alaska, there is unquestionably presented a legitimate field for legislative action. Such action has now been taken. See, e.g., Pub. L. No. 86-257, 86th Cong., 1st Sess. (Sept. 14, 1959). It is worth noting, in passing, that the consent decree in the instant case has been construed as conferring upon the District Court more sweeping regulatory powers than Pub. L. No. 86-257 confers upon the Secretary of Labor.

If the regulatory function thus assigned to the court is beyond the judicial power under Article III of the Constitution of the United States, it cannot have been conferred by consent of the parties. *United States* v. *Ickes*, 84 F. 2d 257, 260 (D.C. Cir. 1936). It has been observed that an attempt by an antitrust consent decree to regulate an industry and its practices would raise "grave problems of legal propriety and legal power." Katz, *The Consent Decree in Antitrust Administration*, 53 Harv. L. Rev. 415, 446 (1940). The case or controversy to which the judicial power extends in such a case is whether or not the defendants have violated the antitrust laws. Reformation or regulation of defend-

ants' affairs beyond that point is essentially a legislative, rather than judicial, problem. So this Court has held in *United States* v. *New York Coffee and Sugar Exchange*, 263 U.S. 611, 621 (1924), where an attempt to regulate the exchange to eliminate the possibility of future wrongdoing was said to be "legislative and beyond [judicial] power." The attempted exercise of such regulatory authority in other analogous situations has likewise been held to transcend the limits of judicial power. *Honolulu R. T. & L. Co.* v. *Hawaii*, 211 U.S. 282, 289 (1908); *Central Kentucky Natural Gas Co.* v. *Comm'n*, 290 U.S. 264, 271-72 (1933).

If, notwithstanding the foregoing, it should be thought that the function here assigned to the District Court might in some conceivable situation be encompassed within the judicial power, the circumstances of this case preclude such a conclusion. As has been shown, the single issue presented in this case was whether the 1957 I.B.T. convention should be invalidated for alleged constitutional violations. The relief sought was that the court enjoin the effectuation of the acts of that convention and direct a new convention with judicial supervision of selection of delegates and balloting at the convention. The respondents even specified in their prayer that, but for such limited judicial supervision, there was not to be imposed "on any member or subordinate body of the International organization the judgment or preferences of" court appointed officers. R. 27. The allegations of the complaint of constitutional violations by a number of local or International officers were made, as a reading of the complaint shows, merely as a basis for a legal conclusion that to require respondents to exhaust their intra-union remedies would be futile. Whether or not

those alleged violators should be disciplined, however, was not part of the controversy presented for adjudication. Beyond the question whether the 1957 convention should be invalidated and a new one held, there was no case or controversy before the court.

As Judge Goodrich said in *Webster Eisenlohr, Inc. v. Kalodner*, 145 F. 2d 316, 319-20 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945):

> "The judicial power is limited to deciding controversies. That has been its function historically; that is its function under the Constitution of the United States. No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them. Whether they would do as well in this respect as officers or bodies expressly set up for that purpose may be doubted, but until the concept of judicial power is widened to something quite different from what it now is courts will better serve their public function in limiting themselves to the controversies presented by parties in litigation."

By no stretch of construction, in this limited suit by thirteen members of five New York locals of the I.B.T. seeking a new convention, was there "presented by parties in litigation" any case or controversy requiring what amounts to a broad legislative inquiry into the affairs of all the other locals and subordinate bodies of the I.B.T.

The exercise of such regulatory authority is all the more incongruous where, as here, it attempts to adjudicate the rights of local unions and their officers not themselves parties to the suit or subject to the court's jurisdiction. The court below thereby violated the

settled limitation that a court has no power to adjudicate the rights of persons not before it. *Mallow v. Hinde*, 12 Wheat. 193, 198 (1827); cf. *Pennoyer v. Neff*, 95 U.S. 714 (1878); cf. 3 MOORE, FEDERAL PRACTICE (2d ed. 1948), pp. 2146-47.

II. Even if the Decree, as Construed by the Court of Appeals, Was Within the Judicial Power, It Violates the Principle of Judicial Self-Restraint

It is a well established principle that the internal affairs or determinations of a voluntary association are not to be interfered with by the courts except in special circumstances showing violation of the rights of members under the association's constitution. *Green v. Obergfell*, 121 F. 2d 46, 55-56 (D.C. Cir. 1941). By a corollary principle, such judicial intervention as is required should be kept to a minimum. See Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993, 1027 (1930). These principles apply with special force to labor unions, as to which Congress, in the Norris-LaGuardia Act and the National Labor Relations Act, has expressed a policy against gratuitous interference. See *Green v. Obergfell*, 121 F. 2d at 68-69. Even in review of orders of the National Labor Relations Board, this Court has held, Congress did not intend that the courts should try alleged violations of the National Labor Relations Act "not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found." *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 435 (1941); see also *International Brotherhood of Teamsters v. N.L.R.B.*, 262 F. 2d 456, 463 (D.C. Cir. 1958).

The illegality on account of which judicial interference was here sought and the only matter in con-

troversy was the alleged rigging of the 1957 convention. The only judicial interference that was sought was the undoing of that convention and the holding of a new one under supervision of the court. And, as already pointed out, the prayer for relief explicitly limited the judicial interference that was sought to the establishment of fair election procedures and the supervision of balloting, the judgment or preferences of the court's officers not to be imposed upon the union in any other respect. R. 27. It would seem, therefore, that the foregoing principles of non-interference should have dictated that the court restrict itself to bringing about the earliest possible new elections under judicial supervision and under fair procedures.

As the Court of Appeals construes this decree, the District Court, far from limiting its interference to the alleged illegality which was the subject of the suit, is to undertake a continuing supervision of the internal affairs of this large trade union, in derogation of the members' right of self-government, for the purpose of investigating any complaint that may come to its attention, holding hearings on each such complaint and issuing orders which it deems appropriate. This jurisdiction is to continue until the District Court is satisfied with every facet of the I.B.T.'s affairs. Only then is the court to permit the holding of the new convention which was the object of the suit.

By this construction of the consent decree, the relatively simple lawsuit seeking a new convention can swell and multiply until it absorbs so disproportionate a share of judicial time and facilities as to impair the administration of justice in all other cases. Moreover, since no greater judicial power can be exercised by consent than without it, *United States* v. *Ickes*,

supra, if this consent decree, as construed below, was a proper exercise of judicial power by the District Court for the District of Columbia, that court can anticipate a constant stream of litigation looking toward similar relief against others of the numerous labor unions having their central organizations in Washington, D. C. That Court, already endowed with a much greater range of jurisdiction than other federal district courts, could foreseeably become a special "labor court", to the detriment of all its other business. Even where the parties clearly and explicitly agree upon such a role for the court, the court should reject it as imposing an unduly burdensome task of supervision. See Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1316-17 (1959). The court should be even more reluctant to assume such a role when there has been no explicit agreement by the parties to impose it.

III. The Consent Decree, as Properly Construed, Does Not Confer Upon the District Court the Sweeping Power Found by the Court of Appeals

The construction of the consent decree by the court below raises, as has been shown, a serious constitutional question of judicial power. That construction, moreover, affects deeply the interests of 1,600,000 members of a union. In these circumstances, petitioners, while not unmindful that this Court will not ordinarily exercise its certiorari jurisdiction to inquire into the propriety of a lower court's construction of a decree, respectfully submit, that such an inquiry should here be made.

On the eve of the compromise, the most that the respondents could hope for was that they would succeed in undoing the 1957 convention and in obtaining

an order for a new convention under judicial supervision. Moreover, they had no assurance that the case they had made was persuasive and, of course, they had no way of knowing how strong a case the petitioners could make in defense. They had, therefore, to consider the possibility that they might suffer a complete defeat.

The petitioners, on the other hand, were confronted not only with the alternatives of winning or losing the suit, but also with the fact that, in either event, because of the preliminary injunction, the will of the 1957 convention would be thwarted for an extended period, with the I.B.T. remaining under the superseded leadership of its former General President and under the government of the superseded 1952 constitution.

The consent decree embodied a broad compromise serving the interests of both sides, although both also retreated from their extreme positions. The new officers gained immediate installation in office, but undertook to submit to a new election before completion of the full constitutional five-year term. The respondents, though giving up their demand that the new officers not be installed, were assured that there would be a year's observation of various union affairs by a Board of Monitors and an undertaking by the new officers during that year to study certain conditions within the I.B.T., with the counsel of the Board of Monitors, and take such action as might be necessary. After the expiration of one year the General Executive Board was empowered to call a new convention, the holding of which would terminate the monitorship. Although the General Executive Board could theoretically postone the new convention call beyond the year, their natural desire to rid themselves of the monitor-

ship was relied upon to induce them to call the convention at the earliest possible moment. Moreover, the fact that the Board of Monitors was to spend a full year looking over the shoulders of the officers into various aspects of union affairs, coupled with the requirements of paragraph 9 of the decree (Appendix, p. 42a), gave the respondents substantial assurance that the new convention would be fair and constitutional.

Had petitioners confessed judgment or defaulted, a decree would have been entered enjoining the effectuation of any of the acts of the 1957 convention and ordering a new convention to be conducted under the eyes of court-appointed officers and to be attended by delegates selected according to procedures devised by those officers. Beyond this, there would have been no judicial interference in the internal affairs of the I.B.T., or its constituent locals.

The consent decree, as was recognized by all the parties and by the District Court, embodied a compromise, not a surrender. R. 996-97, 1009-11, 1013. As respondents' counsel acknowledged before the District Court, respondents obtained under the decree *less* than they had sought by their complaint. R. 1114. The construction of the consent decree by the Court of Appeals, however, is grounded on an assumption that the petitioners, in compromising the suit, consented to the imposition upon them of far *greater* restraints than would have been suffered through unconditional surrender. That court has construed the consent decree as obligating the petitioners to conduct a judicially supervised overhauling of the I.B.T. and its constituent locals; and it has held that, so long as the petitioners have not fulfilled that obligation to the

satisfaction of the District Court, that court may (1) prevent the calling of a new convention, (2) keep the monitorship in force, and (3) receive reports of the Board of Monitors with respect to any allegedly undesirable conditions they may find and, after affording petitioners a hearing, order them to take whatever action it deems necessary.

It would seem that, if the parties had intended that the I.B.T. be subjected to a long, intensive ordeal by judicial purge, it would not have been very difficult to say so in the consent decree. An examination of the decree shows, however, that the only obligations it places on the petitioners are the following:

1. Under paragraph 4, to recommend to the locals, for adoption whatever by-laws, not inconsistent with the constitution, the Board of Monitors may draft.

2. Under paragraph 5, to review accounting and financial procedures and controls and establish such procedures and controls "where needed"; and to require adherance to recognized fiduciary standards.

3. Under paragraph 6, to be free from conflict of interest.

4. Under paragraph 7, to review and, as speedily as is consistent with membership interests, eliminate local trusteeships.

5. Under paragraph 9, to recommend to the locals that delegates to the new convention be elected by secret ballot and, where practicable, under supervision of an independent agency.

6. Under paragraphs 10 and 14, to pay the fees and expenses of the Board of Monitors and of counsel for the plaintiffs.

7. Under paragraph 12, to provide the Board of Monitors with clerical and technical help.

8. Under paragraph 13, to refrain from reprisals against persons involved in the suit.

9. Under the various provisions giving the Board of Monitors authority to counsel with or make recommendations to the General Executive Board, to receive and consider in good faith such counsel or recommendations.

Nowhere in the language of the decree can there be found an undertaking by the petitioners of any obligation from which the District Court can derive any authority to conduct a protracted, far-ranging investigation of virtually every facet of the affairs of the I.B.T. and its locals and order whatever change it deems desirable, including institution of proceedings for expulsion or other disciplining of local and International officers. Petitioners, by entering into a compromise of a suit challenging the 1957 convention and seeking a new one, have not placed the I.B.T. and all its constituent locals in the hands of a federal judge in the District of Columbia for him to do with as he wills until such time as he thinks he has done enough.

The conclusion of the Court of Appeals to the contrary rests chiefly on paragraph 5 of the consent decree which reads:

> "The General Executive Board in consultation with the Board of Monitors shall review and where needed establish accounting and financial methods, procedures, and controls affecting all funds and properties held, received and disbursed by or on behalf of the [IBT] and its subordinate bodies. All persons having custody or management of

such funds or properties shall be required to adhere to the recognized legal and equitable standards and obligations imposed upon fiduciaries in the handling of such funds and properties."

One would suppose that so extreme, unprecedented and far-reaching an undertaking as the Court of Appeals reads into this language would have been expressed in more explicit terms. Actually, as its plain language shows, paragraph 5 provides only for the establishment of necessary general accounting and financial procedures and controls, including the requirement of adherence to recognized fiduciary standards (presumably to be spelled out in the general procedures and controls to be established). Paragraph 5 thus deals solely with the promulgation of general rules for the handling of funds and properties, as distinguished from any mandate for the enforcement of such rules in individual cases. The second sentence of paragraph 5, on which the Court of Appeals primarily relied, must be read in conjunction with the first sentence, and, so read, it is clear that it merely amplifies the general language of the first sentence with respect to the standards to be required in the handling of funds and properties. Furthermore, the second sentence is clearly prospective, and, therefore can in no event support the position of the Court of Appeals that it is a mandate for the institution of disciplinary proceedings on account of alleged acts committed long before the entry of the consent decree. The provision is that persons having custody or management of funds or properties "shall be required to adhere" to recognized fiduciary standards and obligations, not that they shall be required *to have adhered* to such standards.

So alien to the language of the decree[6] and the circumstances of its adoption is the construction below that one must conclude that the court was not construing the decree, but rather "substantially changing the terms of a decree to which the parties consented without any adjudication of the issues", something which this Court has said it may not do. *United States v. Atlantic Refining Co.*, 360 U.S. 19, 23 (1959).

The action of the court below, whether it be called construction or modification of the consent decree, amounted, as has been shown, to imposing upon petitioners obligations which they had never agreed to assume, which were not contemplated by the parties and which far exceed anything petitioners could have suffered through an absolute confession of judgment. As will appear from the following section of this petition, the court below then proceeded to seize upon petitioners' failure to carry out some of the obligations thus imposed upon them, as a basis for depriving them of their right to call a new convention.

IV. The Court Below Has Made Unwarranted Unilateral Modifications of the Consent Decree

Paragraph 8 of the consent decree provides:

> "The Board of Monitors appointed herein shall serve as such for at least one year and thereafter until a new convention of the [IBT] is held at

[6] It is submitted, for example, that no twisting of the language of paragraph 5 of the decree can possibly make it mean that the District Court has authority to order the I.B.T. to proceed against a suspended business agent of one of its locals in connection with his alleged activities in organizing an independent union in a jurisdiction entirely different from that of the I.B.T. Yet, that is one of the powers that the Court of Appeals has read into the paragraph. Appendix, p. 57a.

which convention officers are duly elected and sworn . . .

"A new convention and election of officers shall be held at any time after the expiration of one year from the date of this order when the General Executive Board by majority vote shall resolve to call such convention and hold such election . . ."

The judgment below modifies this paragraph to provide that the new convention and election shall be held at such time as "the District Court shall determine that such convention and election be called and held." Appendix, p. 59a.

This modification, deprived the petitioners of their right to bring about, after one year, a termination of the monitorship and a substitution of a regular constitutional administration of the I.B.T. for the provisional administration set up under the consent decree. The whole nature of the compromise was changed by transferring this right from the petitioners to the District Court.

The validity of this modification is a question of grave importance not only insofar as it affects the interests of the members of the I.B.T., but also as it bears upon modifiability of consent decrees in other cases, notably in antitrust cases, where the consent decree has become a very important instrument of law enforcement. See Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 Yale L. J. 1391 (1959); Note, *The Consent Judgment As An Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314 (1959); Katz, *The Consent Decree in Antitrust Administration*, 53 Harv. L. Rev. 415 (1940); Isenbergh and Rubin, *Antitrust Enforcement Through Consent Decrees*, 53 Harv. L. Rev. 386 (1940).

The underlying principle determining modifiability of consent decrees was set forth by this Court in *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). There can be no unilateral modification of a consent decree that protects "rights fully accrued upon facts so nearly permanent as to be substantially impervious to change . . ." The decrees that are unilaterally modifiable are only "those that involve the supervision of changing conduct and conditions and are thus provisional and tentative." An example of a modifiable decree is presented by *Coca Cola Co.* v. *Standard Bottling Co.*, 138 F. 2d 788 (10th Cir. 1943), where the defendant was freed from a consent decree enjoining use of the name "cola", because the facts upon which the plaintiff's right had been based—exclusive ownership of the name—had changed. But where the facts upon which the protected rights depend have not changed, the only change being in the plaintiff's evaluation of the relief agreed upon, there are no grounds for modification. *United States* v. *Atlantic Refining Co.*, *supra*; *Hughes* v. *United States*, 342 U.S. 353, 357 (1952); *United States* v. *Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). Even where the plaintiff is the United States, the fact that the change it seeks is one which would more effectively protect the litigated right and one which it could have obtained originally through litigation is no reason to free it from the bargain it made. *Ibid.* If hindsight is unavailable to the United States in such a case, it follows *a fortiori* that parties to purely private litigation are bound by consent decrees entered into in good faith.

The right asserted by respondents in this case was the right to a new convention to be conducted under the

eye of the court. The fact upon which the asserted right depended was the alleged rigging of the 1957 convention. That fact, if true, gave rise to the asserted right to have a new convention held and the right was fully accrued. The alleged rigging, if it occurred, was all in the past and it consisted of absolutely immutable events. The fully accrued right to a new convention, resting on the immutable alleged events, is what was settled by the consent decree. No post-decree event would affect the right in any way. The parties are, therefore, to be governed by the decree they bargained for and the court may not modify the decree to change the relief upon which they agreed.

Even where there is a post-decree change in the circumstances it does not follow that there may be a unilateral modification of the decree. As this Court said in *Swift & Co.*, 286 U.S. at 119:

> "Nothing less than a clear showing of grievous wrong evoked by *new and unforeseen* conditions should lead us to change what was decreed . . . with the consent of all concerned." (Emphasis supplied.)

The post-decree events upon which this unilateral modification is based are that the petitioners have in some respects purportedly failed to carry out the obligations imposed upon them by the decree, or, as the District Court had put it, that they have failed to comply with "reasonable and relevant orders of recommendation" of the Board of Monitors. By no stretch of the imagination, however, can such events be held to have been "unforeseen" when the decree was made. The record shows that disagreement between the petitioners and the Board of Monitors was within the contemplation of the parties. The initial draft of the decree, as proposed by the respondents, had provided

for "trustees" empowered to "supervise the officers" of the I.B.T., "enforce" the constitution and "require compliance." R. 992. That draft was rejected in favor of the present decree providing for a recommendatory role for the Board of Monitors with discretion over the administration of I.B.T. affairs left in petitioners, its constitutional officers. Since the possibility of petitioners' non-compliance with monitorial recommendations was one of the conditions in existence when the decree was made and the parties consciously chose to leave ultimate discretion in petitioners, the post-decree fact of non-compliance cannot justify modifying the decree in effect to require compliance.

Default by an antitrust defendant in performance of what a consent decree requires of him, does not relieve the plaintiff from the disposition to which he has agreed in the consent decree, "since the possibility of default was not a circumstance of which he was then unaware and which would have impaired the validity of the agreement." Note, *The Consent Judgment As An Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1318 (1959). To be sure the Court which enters an antitrust consent decree maintains supervision of the defendant's conduct. But if that conduct becomes violative of the decree, the remedy is a contempt proceeding, not a modification of the decree to require him to do something different from what was bargained for. The view taken by the Court of Appeals—that a consent decree becomes unilaterally modifiable, rather than merely enforceable, when the defendant violates it—would throw open to unilateral modification virtually every consent decree heretofore entered in antitrust cases. This would presage the abandonment of the consent decree as a device in antitrust law enforcement.

If the Court of Appeals were correct, the books should abound with instances of unilateral modifications of antitrust consent decrees. Such modifications are, however, a rarity in the law, because they require a showing of substantial change *in the circumstances which gave rise to the protected right*, not merely the occurrence of events otherwise affecting the parties' interests. Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 Yale L. J. 1391, 1393-97 (1959). To permit modification where their interests are otherwise affected, parties have developed the practice of specifying in decrees the contingencies upon which there may be modifications. *Id.* at 1393; see cases cited at 1396-97. Nothing in the instant decree can be read as providing that the right of the General Executive Board of the I.B.T. to call a new convention is to be suspended in the event that the respondents decide, and the District Court agrees with them, that they should have held out for a longer monitorship than was specified in the decree. Indeed, the only fair reading of the decree is that the termination of the monitorship at any time after a year from the date of the decree is left to the sole discretion of the General Executive Board.

Also militating against this modification of the consent decree is the fact that it thwarts, rather than effectuating, the decree's basic purpose. *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942).

The purpose of the suit was to obtain a new convention. The clear and unmistakeable purpose of the consent decree was to assure the speediest possible convention call to "be issued in accordance with the International constitution by the General Executive Board." Appendix, p. 42a. Whatever was to be done

under the decree was to be done in a manner "guaranteed by", "pursuant to", "not inconsistent with", "specified by", "in accordance with", or "in strict and literal compliance with" the I.B.T. constitution. See paragraphs 3, 4, 8 and 9 of the decree, appendix, pp. 40a, 42a.

Paragraph 1 of the consent decree provides that the 1957 constitution "shall forthwith go into effect, provisionally in accordance with the following paragraphs of this decree." Appendix, p. 39a. Under Article III, Section 1 of that constitution, the convention is "the supreme governing authority" of the I.B.T. and has "the plenary power to regulate and direct the policies, affairs, and organization" of the I.B.T. Such convention is required to be held every five years at such time and place as may be designated by the General Executive Board upon the recommendation of the General President.[7] To provide for contingencies requiring convention action earlier than the regular convention date, the constitution, in Article IX, Section 7, entrusts the General Executive Board with discretion to call, by majority vote, a special convention.[8] This discretion to convoke a special convention, which was provided for in the 1952 constitution as well,[9] is not made delegable by the General Executive Board. Indeed, as distinguished from the regular convention, the date of a special convention is not even subject to the General President's recommendation. Those of the petitioners who constitute the I.B.T.'s General Executive Board, had constitutional

[7] Stipulation filed herein September 18, 1959, Exhibit B, p. 6.

[8] *Id.*, p. 35.

[9] *Supra* note 7, Exhibit A, p. 29.

discretion to meet the problems posed by this litigation by calling a special convention and had no authority to consent to a transfer of that discretion to anyone else. The purpose of the consent decree, therefore, cannot have been to make a transfer of discretion to the District Court to which the petitioners had no authority to consent.

The court below has also made other unilateral modifications which thwart the decree's basic purpose of constitutionalism. It imposed upon the I.B.T., for example, an election-eligibility rule at variance with the provisions of the I.B.T. constitution. That the court may have considered its action in this respect merely an interpretation or construction is of no consequence, for a substantial change in the parties' agreement is a modification, whatever the court may call it, and may not be made without consent. *United States v. Atlantic Refining Co.* 360 U.S. at 23.

The 1957 constitution of the I.B.T. provided, in an amendment to Article X, Section 5(c), that members whose dues are being checked off by employers, to protect their good standing (and their eligibility for election) against late transmittal of their checked-off dues by their employers, must pay one month's dues in advance.[10] The court below held that this provision is to remain ineffective until notice of its effectiveness shall have been given to the membership in a manner to be agreed upon or, absent such agreement, as is required by the District Court. Appendix, p. 52a.

Section 3 of the decree gives the Board of Monitors counselling authority "in order to insure the enforce-

[10] *Supra* note 7, Exhibit B, p. 38.

ment and protection of all rights" of the membership, including "the right to fair and uniform qualifications to stand for office . . ." It specifies, however, that the rights thus to be ensured and protected are "as guaranteed by the provisions of the International constitution. . . ." Appendix, p. 40a. It follows, therefore, that the election eligibility rule established by the 1957 constitution is in full force and effect and that the consent decree did not undertake to alter that rule by postponing its effectiveness.

The District Court had held that, while the amendment of Article X, Section 5(c) went into effect on January 31, 1958, under the consent decree, "due process" required postponement of its effectiveness until a prescribed notice should be given to the members. Appendix, pp. 7a-8a. It also found the amendment invalid on grounds of "public policy", quite apart from the question of notice. Appendix, p. 9a. The Court of Appeals, while apparently upholding the validity of the 1957 amendment, held that it is ineffective until adequate notice has been given the members.

Whether this holding is based upon "due process", upon "public policy", or upon the court's concept of what is desirable in labor unions' administration of their internal affairs does not appear from its opinion. It is clear, however, that, since no governmental action is involved in this question, the due process clause is inapplicable. See *Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, 262 F. 2d 359, 363 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959); *Conrad* v. *International Photographers of Motion Picture Industry, Local 659*, 176 F. 2d 1000, 1003 (9th Cir. 1949);

Schatte v. International Alliance of Theatrical Stage Employees, 70 F. Supp. 1008, 1010 (S.D. Calif. 1947), *affirmed*, 165 F. 2d 216 (9th Cir.), *cert. denied*, 334 U.S. 812 (1948). We submit that concepts of "public policy" and desirability are equally inapplicable to the question whether a union may, by majority vote of a convention of the membership, enact a rule that, from and after the date of enactment, no member not currently paid up on the books of his local shall be eligible for election to office. This is precisely the sort of internal matter which is traditionally held to be controlled by the union constitution, the members' contract of affiliation, and to be beyond judicial interference unless there is a violation of that constitution. *Green v. Obergfell*, 121 F.2d at 55; see also *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958); and see, generally, *Chafee*, *supra* p. 14.

When the 1957 constitution went into effect with the lifting of the preliminary injunction and the entry of the consent decree in January of 1958, the amendment to Article X, Section 5(e) became immediately effective, because there was nothing in the constitution providing otherwise. If the case had gone to trial, the court, upon a proper showing by the respondents, could have held the entire constitution invalid. Absent a showing that the constitution had been invalidly adopted, the court would have had no alternative but to declare the document effective in all respects. It could not have accepted the provisions it liked and rejected those it disliked. Nor could it have injected into the constitution a provision which was not in it, but which the court thought should be in it. And it could not have derived such authority to rewrite the constitution from the fact that the petitioners con-

sented to a decree, for they themselves have no authority, as officers of the I.B.T., to change the constitution adopted by the membership. What they consented to, as has been shown, was the immediate effectuation of the 1957 constitution as adopted by the membership, to remain in full force and effect until resubmission to a new convention. The injection by the court below of a requirement of notice before a part of the constitution can become effective is, therefore, an unwarranted modification of the consent decree.

Another invasion of the integrity of the I.B.T. constitution and, thus, a substantial modification which thwarts, rather than effectuating, the purpose of the consent decree is the imposition by the court below of intra-union disciplinary procedures other than those to which the members have bound themselves by adopting the constitution.

The court, in ordering institution of a trusteeship proceeding against Local 107, requires that a public member be placed on the panel. Appendix, p. 54a. This goes beyond the provisions of Article VI, Section 5(a) of the constitution,[11] and is a substantial departure from the I.B.T. practice of restricting all hearing panels to union members or such members of the union "family" as the House Counsel or the International Economist. R. 534.

In ordering proceedings against I.B.T. Vice President Brennan, the court below requires the employment of "an outside attorney to serve as special counsel in advising the charging party with respect to the preparing and processing of charges and the conduct of

[11] *Id.*, p. 18.

the hearing on charges . . . ." Appendix, p. 55a. Nowhere in the constitution have the members consented to the intervention of outsiders in any of their internal disputes or to the expenditure of their funds for the employment of such outsiders. Indeed Article XVIII, Section 1(b) provides that the party charged may be represented only by a fellow-member.[12] This same limitation has always been applied to the charging party. R. 387. The court, moreover, has undertaken to designate that the charging party shall be either General Secretary-Treasurer English or First Vice President Conlin and that the charging party shall be disqualified to sit in judgment of the charges. Appendix, pp. 55a, 56a. That the charging party is disqualified by bias from sitting in judgment is not questioned. Indeed that principle is written into Article XVIII, Section 1(a) of the constitution.[13] It is another matter, however, when the charging party has no bias, but brings the charge only at the order of the court. Since the charges against Vice President Brennan must be heard by the General Executive Board under Article XVIII, Section 3(d)[14], to require any member of the General Executive Board to bring the charges against his will and then to disqualify him from participating in the Board's deliberations deprives the membership of the I.B.T. of their constitutional right to his services as their duly elected representative on on the governing body of the I.B.T.

The relative ease with which the court below finds it possible to impose modifications on this consent decree may be attributable to that court's conclusion,

[12] *Id.*, p. 68.

[13] *Id.*, p. 67.

[14] *Id.*, p. 71.

expressed in the companion case decided the same day and referred to in its opinion in the instant case, that the decree was not really intended to settle anything.[15] The court agreed with the District Court that "the consent decree 'is not a final settlement of the essential issue but is interlocutory in nature.'" Appendix, p. 65a. It added:

> "No one has been closed out of the present litigation by a dismissal or compromise. The litigation continues. No member of the class has been barred from access to the court." Appendix, p. 66a."

Presumably, a purely interlocutory decree, not intended to be dispositive of the issue presented by the controversy or to foreclose the position of any party or potential party, is more amenable to change than a final decree. The lower court's characterization of the decree, however, seems clearly erroneous.

[15] *Cunningham* v. *English, et al.*, United States Court of Appeals for the District of Columbia Circuit, No. 15033, decided June 10, 1959, a copy of which is attached hereto at appendix, p. 63a. The question in that case was whether the consent decree was invalid under Rule 23(e), F.R. Civ. P., because of failure to give notice to the members of the plaintiff class before entry of the decree. The present petitioners there took the position that the decree was valid either because the class action, as designated in the complaint, was not within Rule 23(a)(1), or, if it was within that part of the rule, the post-entry notice which was given to the members of the class was, in the circumstances of the case, sufficient to satisfy the requirements of Rule 23(e). The Court of Appeals held that the action was within Rule 23(a)(1), but that no prior notice of the decree was required because the decree was not a compromise within the meaning of Rule 23(e). Thus, although it sustained petitioners' position that the compromise should not be undone, the Court of Appeals incidentally held that there was really no compromise to undo. This companion case is now before this Court on Cunningham's petition for certiorari, No. 383, filed September 8, 1959.

The statements of the District Court and of counsel for both sides at the time the decree was adopted show beyond question that the decree was intended as an embodiment of a compromise settling the lawsuit. Counsel for the defendants offered the proposed decree to the court as "a disposition of this case" bringing the case to "an equitable conclusion." R. 996-97. Counsel for the plaintiffs agreed with this statement and called the decree "as fine a settlement of as difficult a problem as I have ever been confronted with in my life." R. 1009-10. The District Court itself adopted the decree as "a settlement of these great issues." R. 1013.

Thus, the clearly-expressed intent of all who were concerned in the adoption of the decree precludes the conclusion reached by the court below that the decree was intended to leave the controversy open for future final disposition. If a member of the class the respondents claim to represent were to intervene in the action and were to attempt to offer evidence in support of the allegations in the complaint and to demand the relief therein prayed, it seems clear that his evidence would be rejected and his demand denied on the ground that the issues he seeks to litigate have been disposed of by compromise and that he may claim only the relief provided in the consent decree, not that demanded in the complaint. In short, he would be told that the consent decree was a settlement of the parties' rights. Petitioners submit, therefore, that, to the extent that the holding of modifiability of the decree rests on a theory that the case is still open to judgment, the holding is erroneous.

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari should be granted.

Respectfully submitted.

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